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Supreme Court of the United States

October Term, 1951.
No. 443.

UNITED STATES OF AMERICA,

Appellant,

vs.

EFROIM SPECTOR.

Appellee.

PETITION FOR REHEARING.

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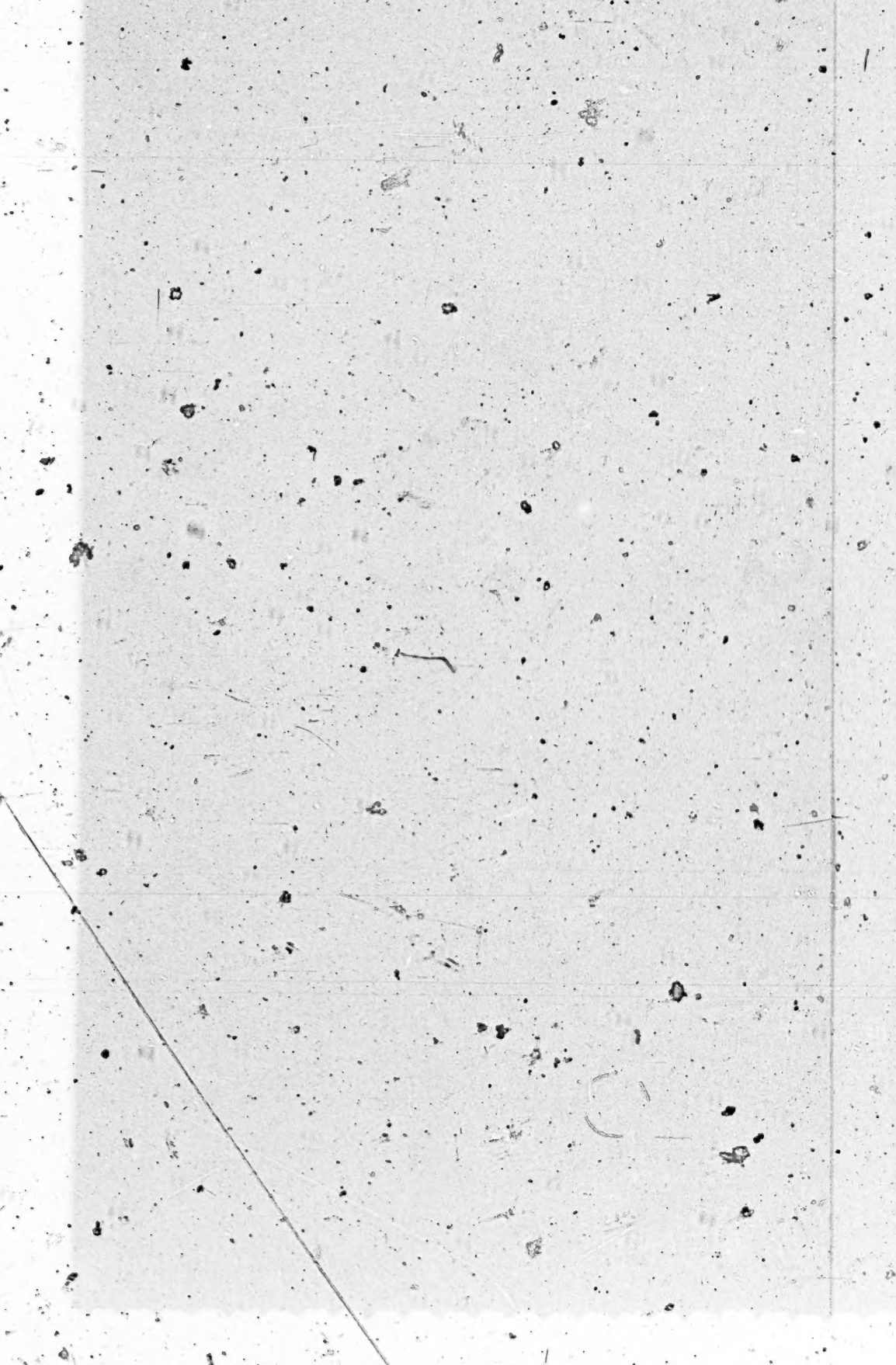

IN THE

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Two of the Court's three opinions raise and deal with a grave constitutional issue presented by Section 20(c) on its face which was not briefed or argued by either of the parties upon the appeal. This question is whether the Constitution permits foreclosure from consideration and determination at the criminal trial of the validity of the deportation order which purports to render the alien's presence in the United States unlawful. The importance of the question, as Mr. Justice Jackson's dissenting opinion points out, results from the fact that the deportation order is made by an administrative officer upon a mere preponderance of the evidence in a proceeding which this

Court has held to be civil in character. See *Harisiades v. Shaughnessey*, 342 U. S. 580; *Carlson v. Landon*, 96 L. Ed. (Adv. Op.) No. 10. Thus the statute on its face forecloses trial by the jury of one of the elements of the crime.

The majority opinion expressly reserves decision of this question "until a stage has been reached where the decision of the precise constitutional issue is necessary." We submit that a decision is necessary now.

As the government pointed out in its brief in this case (page 11) there were nearly 3,000 cases, when Section 20(c) was considered and adopted by the Congress, of aliens against whom deportation orders had long been outstanding. Expulsion of this group of aliens was indeed the particular objective of the statute. It must be expected therefore that following this Court's decision in the present case many prosecutions under Section 20(c) will be instituted by the government. Unless the question laid aside by the majority is settled now it is apparent that conflict and confusion as to the issues open to the court and jury at the trial under the statute will prevail. Without doubt trial courts will differ in rulings upon offers to attack the validity of the deportation order. Indeed the trial judge who will sit in this case will want for guidance from this Court upon the point.

In the interests of securing to persons prosecuted under Section 20(c) including the appellee here, the rights which this Court clearly holds are theirs under the Sixth Amendment, so grave a question should be settled before those

rights can be jeopardized. In the interests of orderly administration of justice and because of the importance of clarifying the permissible practice under the statute the question should be briefed and argued now. See *Sacher v. United States,* 96 L. Ed. (Adv. Op.) No. 10.

This Court may and will call for reargument of vital constitutional issues "where doubts are entertained which it is supposed may be removed by further discussion at the bar." *Brown v. Aspden's Administrator,* 14 How. 25. See *Home Insurance Co. v. New York,* 134 U. S. 594; *United States v. Grinaud,* 220 U. S. 506.

Nor are these considerations to prevail only where the Court is evenly divided. Both this appellee, other persons in the same position and the District Courts generally will benefit from the briefing argument and decision of this vital question. There can be no doubt that the issue ultimately will come before this Court for resolution. Authority permits the present decision for which the foregoing considerations argue. *Terminiello v. Chicago,* 337 U. S. 1. They clearly outweigh the accident that this ground was dealt with neither by the Court below nor by the parties.

For all of the foregoing reasons therefore we submit that the Court should now invite analysis and argument by the parties of the constitutionality of Section 20(c) in respect to its foreclosure of opportunity to secure a determination by the Trial Court of the legal and constitutional validity of the deportation order. This Court can then

determine the question with binding authority to the benefit not only of this appellee but of the administration and enforcement of this novel and far reaching statute.

Respectfully submitted,

JOHN W. PORTER
for
MARGOLIS & MCTERNAN,
Attorneys for Appellee.

Certificate of Counsel.

I certify that the within and foregoing Petition for Rehearing is presented in good faith and not for purpose of delay.

JOHN W. PORTER.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1952.

4-18-52—60